

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LISA MCFALLS, et al.,	)	
	)	
Plaintiffs,	)	Case No. 3:16-cv-02116-SI
	)	
v.	)	
	)	
SONNY PERDUE, Secretary of the	)	March 17, 2020
Department of Agriculture, et	)	
al.,	)	
Defendants.	)	Portland, Oregon
	)	

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**Telephone Hearing**

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFFS: Mr. Gideon A. Anders  
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1 (P R O C E E D I N G S)

2 (March 17, 2020; 1:33 p.m.)

3 \* \* \* \* \*

4 THE CLERK: Counsel, I'd like to get your appearances  
5 for the record before we begin. Can we begin with plaintiffs,  
6 please.

7 MR. PIJANOWSKI: Good afternoon. Mike Pijanowski for  
8 plaintiffs.

9 MR. ANDERS: Gideon Anders, also for plaintiffs.

10 THE CLERK: Thank you.

11 MS. MCNEILL: And Kathryn McNeill for plaintiffs.

12 THE CLERK: And for defendants?

13 MR. MARTIN: Good afternoon. This is Sean Martin  
14 with the U.S. Attorney's Office.

15 THE COURT: All right.

16 THE CLERK: Thank you.

17 Your Honor, this is the time set for a telephone  
18 conference in Civil Case 16-2116-SI, McFalls, et al. versus  
19 Perdue, et al.

20 And counsel, there is a court reporter present, so  
21 please state your name before you speak.

22 And here is Judge Simon.

23 THE COURT: Good afternoon, everyone. I have  
24 received and read your joint status report. I would like to  
25 hear a little bit more from the government in terms of what

1 exactly are you expecting will happen in June, and tell me a  
2 little bit more about that situation, please.

3 MR. MARTIN: Well, thank you, Your Honor. This is  
4 Sean Martin.

5 First of all, things are on a hold. I mean, there is  
6 no -- any kind of -- no imminent prepayment situation or risk  
7 with the Golden Eagle II project. The best information I have  
8 is that in June, it will be known, if all goes according to  
9 plan, whether grant monies are available to the State of Oregon  
10 to help enable this transfer to actually be completely  
11 consummated. So that's unknown right now.

12 The nonprofit entity has applied for the grant  
13 funding, and Rural Development, the federal agency here that I  
14 represent, has filed a letter to the (indiscernible) court of  
15 that grant funding application, the point being this would help  
16 preserve a loan from Housing Opportunities in that county.

17 But I don't have more information right now. To be  
18 frank, Judge, I don't know what effect the COVID situation will  
19 have on timing.

20 THE COURT: Sure, sure.

21 And let me ask you this, Mr. Martin. Thank you. Let  
22 me ask you this as a follow-up. If the funding is approved,  
23 either June or whenever it gets approved, what steps need to  
24 happen next in order for this nonprofit to then become the new  
25 owner?

1 MR. MARTIN: You know, I know a lot has been  
2 preloaded. I wish I had more technical specifics on the tip of  
3 my tongue, Judge, but I do understand that this isn't imminent.  
4 If the money comes through, let's say, in June, I understand  
5 that there is a 24-month maximum that this nonprofit entity has  
6 to sort of complete all the paperwork and get this property  
7 into its hands and be on the deed chains and be the official  
8 owner.

9 So I know that there are some steps, but this is a  
10 really significant positive development. During that public  
11 posting process, right after the civil rights analysis was  
12 issued, you know, and the agency reached out for interest and  
13 got this, and it looks like the initial vetting has been pretty  
14 positive, and it seems like it could be feasible.

15 So -- but I wish I had more of a technical outline.  
16 I view the grant funding as sort of an important first step  
17 that would sort of pave the way for this to be absolutely  
18 something that's going to remain in the program portfolio.

19 THE COURT: And so that really anticipated my next  
20 question, Mr. Martin, but let me just confirm that if the  
21 funding goes through and if the closing takes place and the  
22 nonprofit actually acquires ownership of the property, then the  
23 property remains in the program, and all of the statutory and  
24 regulatory protections for those people living on the property  
25 will then remain in place, correct?

1 MR. MARTIN: Yes, that is my understanding, Your  
2 Honor.

3 THE COURT: And am I also correct in assuming that at  
4 least while things are going on, at least until we know whether  
5 or not the funding goes through, there is no risk of any  
6 adverse action to any of the tenants or the lessees? Am I  
7 correct?

8 MR. MARTIN: Yes, Your Honor. I don't believe  
9 there's any risk of harm to prepayment or losing this project,  
10 yes.

11 THE COURT: All right. Thank you.

12 Does plaintiff want to be heard on anything?

13 MR. ANDERS: Yes, Your Honor. This is Mr. Anders.

14 THE COURT: Oh, Mr. Anders. I'm sorry.

15 MR. ANDERS: First of all, there are two issues.  
16 First of all, my understanding is that the funding of the  
17 nonprofit has applied to cover the purchase of the property.  
18 It does not cover issues regarding leasing the property out to  
19 standards where it could continue to operate under the RD  
20 program for another 20 years, or actually possibly longer.

21 Also, typically what nonprofits do is they go under  
22 the national low income housing tax credit program to get that  
23 funding. That's a longer process which requires application  
24 and requires -- possibly requires an individual to file or the  
25 corporation to apply for the funding multiple times because

1 there is significant competition for those funds.

2 My understanding is that in this case there are also,  
3 for the grant funds, there are -- there is potentially  
4 significant competition for these grant funds that the state  
5 has made available.

6 Beyond that, there is an issue with RD in terms of  
7 when the transfer can take place. The agency has got a  
8 two-step process. However, in order to get that -- to get the  
9 purchase completed, the nonprofit also has to get some funds  
10 from a state-wide nonprofit lender, and they cannot make the  
11 loan to the nonprofit to purchase the property unless the  
12 government is willing to allow the use restrictions that will  
13 be placed, and they'll be placed immediately upon the transfer,  
14 to be listed in order for the nonprofit to get another funding  
15 source to do all of the rehabilitation. So there are a lot of  
16 bits in flux in terms of this funding, and my understanding is  
17 it's really competitive.

18 The other issue, Your Honor, is we have at least a --  
19 we have a nonprofit sponsor or organization as a plaintiff, and  
20 the Court in its February 8 of 2018, I believe, ruling held  
21 that their standing and their right to maintain this case does  
22 not become moot simply because, as in the new case, the  
23 government has voluntarily ceased to take the actions that it  
24 is -- it has taken to try to preserve the development. As we  
25 point out -- as we pointed out before, there are at least three

1 other projects in Tillamook County which are eligible to apply  
2 for the payment, and while we do not know that any of them have  
3 so far applied, they could apply at any point in time, and  
4 therefore the issues which we're seeking to resolve will not be  
5 resolved by the time they are brought.

6 THE COURT: Thank you, Mr. Anders.

7 Any response, Mr. Martin?

8 MR. MARTIN: Yes. Thank you, Your Honor.

9 I would just point out that the government isn't  
10 asking the Court at this point to dismiss the case on potential  
11 mootness, but our point is it seems like an efficient use of  
12 everyone's resources, given the lack of any kind of imminent  
13 harm or really any change in the status quo, to put this  
14 litigation on more of a back burner and let this transfer  
15 process play out so we can see how this is stacking up before  
16 we go back on (indiscernible) with motion practice.

17 And I'll also point out, I would say the government's  
18 concern down the line with the transfer isn't necessarily,  
19 quote/unquote, mootness, but it may be this as-applied  
20 challenge to Golden Eagle II may become sort of a theoretical  
21 or an advisory opinion type situation if you have, you know,  
22 claims that aren't really live anymore, justiciable, based on  
23 changed circumstances, it might not be a mootness question as  
24 much as a question of an advisory opinion.

25 But, again, that's not what the government's concern

1 is right now. It's more that this is a significant  
2 development, a positive development, and in light of, you know,  
3 just stacking up the harms, we think a stay is really  
4 worthwhile at this point and nobody is really harmed, and it  
5 avoids, particularly at this point in time, use of court  
6 resources and government resources and the plaintiffs'  
7 resources when there are probably higher priorities, given  
8 where the facts are in this particular scenario now.

9 THE COURT: All right. Let me ask the parties this,  
10 and I'll probably start with Mr. Anders. I am inclined to stay  
11 the litigation at least through the end of June, and I'm  
12 understanding that perhaps by the end of June there may be a  
13 slight delay because of the current public health emergency,  
14 and knowing that, that I would think there might be a modest  
15 extension at the end of June.

16 But I'd be inclined to stay the case and then direct  
17 the government to file a status report on the situation by the  
18 end of June, by June 30th. But I don't want to deprive the  
19 plaintiffs of their rights to oppose that, if you want to say  
20 something more than what you've said today.

21 So if plaintiff will agree, without waiving any of  
22 its rights, without acquiescing any stay, I'm fine with  
23 entering a stay now until June 30th, but if plaintiff wants to  
24 be heard further on that, then my plan would be to authorize  
25 the United States to file a brief motion to stay and a brief

1 supporting memorandum, and then give the plaintiff an  
2 opportunity to respond, the defendant an opportunity to reply,  
3 and then I'll make a final decision on that record.

4 But I really don't want either side to waste their  
5 time or to do anything really unnecessarily, and I really do  
6 think that a stay through June 30th strikes me as appropriate,  
7 but then again, if defendant -- if plaintiff wants to brief  
8 this issue, I'll certainly let them do that, and then take a  
9 closer look.

10 Mr. Anders.

11 MR. ANDERS: Well, if I heard your -- the Court's  
12 order of February 8th correctly, the claims of here the  
13 nonprofit are potentially referable because of the fact that  
14 they are a public project in Tillamook County, which can't be  
15 stayed, therefore the case does not become moot at that point  
16 in time even if the project gets stayed. So I don't quite see  
17 the purpose of delaying until June 30th.

18 THE COURT: Well, right now we don't have a motion to  
19 dismiss on mootness grounds or standing issues or anything like  
20 that. Probably it would be mootness. We don't have that  
21 motion, and I really don't want to get into those issues.

22 I do think, from my recollection, that this is an  
23 as-applied challenge to the regulations as applied to Golden  
24 Eagle No. II, and if it turns out that all of the tenants of  
25 Golden Eagle No. II are fully protected, then I'd be skeptical

1 that this is the right vehicle to deal with any more abstract  
2 issues that the nonprofit Community Action Resource Enterprises  
3 may wish to assert, but nor would I want to resolve that  
4 nuanced of a question without briefing by both sides.

5 But I think that it doesn't do any harm to the people  
6 living at Golden Eagle II to wait until June 30th, see what  
7 happens. And then as we maybe march forward with this,  
8 Mr. Martin, it might very well be on you then to file some type  
9 of more fleshed-out memorandum that will give me a better  
10 understanding of what the arguments will be if the transaction  
11 closes, and then we can hear Mr. Anders' and plaintiffs'  
12 arguments for what in his view or their view the effect of that  
13 might be.

14 But I think right now the appropriate thing to do is  
15 to stay this case until June 30th, 2020. I'll direct  
16 Mr. Martin, the defendants, to provide a status report on the  
17 funding issue for Golden Eagle II property not later than  
18 June 30th.

19 If for whatever reason, Mr. Martin, it falls  
20 through -- permanently falls through before then, don't wait  
21 until June 30th. Let us all know in a timely fashion. If you  
22 need -- if it turns out that because of the public health  
23 emergency, the approval on public funding is going to take a  
24 bit longer than June 30th, then with your June 30th status  
25 report, feel free to file a more formal motion for an extension

1 of the stay, telling me when you want the stay till, what the  
2 status is, and what you think the likely future situation may  
3 look like.

4 Does that make sense, Mr. Martin?

5 MR. MARTIN: Yes. I will do so, Your Honor. Thank  
6 you.

7 THE COURT: And Mr. Anders, I understand your point  
8 right now, but I'd like you to at least give some thought to --  
9 and at some point we'll maybe need to see some briefing on the  
10 question of if an appropriate nonprofit receives funding and  
11 purchases outright Golden Eagle No. II, such that all of the  
12 named plaintiffs -- McFalls, McFalls, and Woodring -- are fully  
13 protected, and if Community Action Resource Enterprises, who  
14 has brought this also as a plaintiff, but I think in an implied  
15 context, if you think that the case is not going to become  
16 moot, at some point I'm going to need to see briefing.

17 Now, of course, the government is going to have to  
18 file that motion to dismiss on mootness, and they're going to  
19 have to go first, but I think that it's not simply a question  
20 of voluntary cessation anymore if a new owner takes ownership  
21 of the building as a nonprofit and the building remains in the  
22 program. That's not going to be the same thing purely as a  
23 voluntary cessation issue.

24 All right. So we have our game plan until June 30th.

25 Anything else we should discuss this afternoon?

1 Mr. Martin?

2 MR. MARTIN: Nothing from the government, Your Honor.

3 THE COURT: Thank you.

4 Mr. Anders?

5 MR. ANDERS: No, I don't have anything further.

6 THE COURT: All right. Thank you all very much for  
7 calling in. Stay healthy, everyone.

8 (Proceedings concluded at 1:49 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

March 22, 2022

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE

<p>Case 3:16-cv-02116-SI</p> <p><b>MR. ANDERS:</b> [5] 3/9 6/13 6/15 10/11 13/5</p> <p><b>MR. MARTIN:</b> [8] 3/13 4/3 5/1 6/1 6/8 8/8 12/5 13/2</p> <p><b>MR. PIJANOWSKI:</b> [1] 3/7</p> <p><b>MS. MCNEILL:</b> [1] 3/11</p> <p><b>THE CLERK:</b> [4] 3/4 3/10 3/12 3/16</p> <p><b>THE COURT:</b> [13] 3/15 3/23 4/20 5/19 6/3 6/11 6/14 8/6 9/9 10/18 12/7 13/3 13/6</p>	<p>8th [1] 10/12</p> <p><b>9</b></p> <p><b>94103</b> [1] 2/5</p> <p><b>97124</b> [2] 2/8 2/11</p> <p><b>97204</b> [2] 2/15 2/20</p> <p><b>A</b></p> <p><b>about</b> [1] 4/2</p> <p><b>above</b> [1] 14/6</p> <p><b>above-entitled</b> [1] 14/6</p> <p><b>absolutely</b> [1] 5/17</p> <p><b>abstract</b> [1] 11/1</p> <p><b>according</b> [1] 4/8</p> <p><b>acquiescing</b> [1] 9/22</p> <p><b>acquires</b> [1] 5/22</p> <p><b>action</b> [3] 6/6 11/2 12/13</p> <p><b>actions</b> [1] 7/23</p> <p><b>actually</b> [3] 4/10 5/22 6/20</p> <p><b>adverse</b> [1] 6/6</p> <p><b>advisory</b> [2] 8/21 8/24</p> <p><b>after</b> [1] 5/11</p> <p><b>afternoon</b> [4] 3/7 3/13 3/23 12/25</p> <p><b>again</b> [2] 8/25 10/7</p> <p><b>agency</b> [3] 4/13 5/12 7/7</p> <p><b>agree</b> [1] 9/21</p> <p><b>Agriculture</b> [1] 1/6</p> <p><b>Aid</b> [1] 2/7</p> <p><b>al</b> [4] 1/3 1/7 3/18 3/19</p> <p><b>all</b> [16]</p> <p><b>allow</b> [1] 7/12</p> <p><b>also</b> [7] 3/9 6/3 6/21 7/2 7/9 8/17 12/14</p> <p><b>am</b> [3] 6/3 6/6 9/10</p> <p><b>analysis</b> [1] 5/11</p> <p><b>Anders</b> [9] 2/4 3/9 6/13 6/14 8/6 9/10 10/10 12/7 13/4</p> <p><b>Anders'</b> [1] 11/11</p> <p><b>another</b> [2] 6/20 7/14</p> <p><b>anticipated</b> [1] 5/19</p> <p><b>any</b> [13] 4/6 6/5 6/6 6/9 8/2 8/3 8/7 8/12 8/13 9/21 9/22 11/1 11/5</p> <p><b>anymore</b> [2] 8/22 12/20</p> <p><b>anything</b> [5] 6/12 10/5 10/19 12/25 13/5</p> <p><b>appearances</b> [2] 2/2 3/4</p> <p><b>application</b> [2] 4/15 6/23</p> <p><b>applied</b> [6] 4/12 6/17 8/3 8/19 10/23 10/23</p> <p><b>apply</b> [3] 6/25 8/1 8/3</p> <p><b>appropriate</b> [3] 10/6 11/14 12/10</p> <p><b>approval</b> [1] 11/23</p>	<p>approved [2] 4/22 4/23</p> <p><b>are</b> [18]</p> <p><b>aren't</b> [1] 8/22</p> <p><b>arguments</b> [2] 11/10 11/12</p> <p><b>as</b> [16]</p> <p><b>as-applied</b> [2] 8/19 10/23</p> <p><b>ask</b> [3] 4/21 4/22 9/9</p> <p><b>asking</b> [1] 8/10</p> <p><b>assert</b> [1] 11/3</p> <p><b>assuming</b> [1] 6/3</p> <p><b>Attorney's</b> [2] 2/14 3/14</p> <p><b>authorize</b> [1] 9/24</p> <p><b>available</b> [2] 4/9 7/5</p> <p><b>Avenue</b> [4] 2/8 2/11 2/15 2/20</p> <p><b>avoids</b> [1] 9/5</p> <p><b>B</b></p> <p><b>back</b> [2] 8/14 8/16</p> <p><b>based</b> [1] 8/22</p> <p><b>be</b> [26]</p> <p><b>because</b> [5] 6/25 7/22 9/13 10/13 11/22</p> <p><b>become</b> [5] 4/24 7/22 8/20 10/15 12/15</p> <p><b>been</b> [2] 5/1 5/13</p> <p><b>before</b> [6] 1/17 3/5 3/21 7/25 8/15 11/20</p> <p><b>begin</b> [2] 3/5 3/5</p> <p><b>being</b> [1] 4/15</p> <p><b>believe</b> [2] 6/8 7/20</p> <p><b>below</b> [1] 14/4</p> <p><b>best</b> [1] 4/7</p> <p><b>better</b> [1] 11/9</p> <p><b>Beyond</b> [1] 7/6</p> <p><b>bit</b> [3] 3/25 4/2 11/24</p> <p><b>bits</b> [1] 7/16</p> <p><b>bonita</b> [4] 2/19 2/21 14/9 14/10</p> <p><b>both</b> [1] 11/4</p> <p><b>brief</b> [3] 9/25 9/25 10/7</p> <p><b>briefing</b> [3] 11/4 12/9 12/16</p> <p><b>brought</b> [2] 8/5 12/14</p> <p><b>building</b> [2] 12/21 12/21</p> <p><b>burner</b> [1] 8/14</p> <p><b>C</b></p> <p><b>CA</b> [1] 2/5</p> <p><b>calling</b> [1] 13/7</p> <p><b>can</b> [4] 3/5 7/7 8/15 11/11</p> <p><b>can't</b> [1] 10/14</p> <p><b>cannot</b> [1] 7/10</p> <p><b>case</b> [10] 1/4 3/18 7/2 7/21 7/22 8/10 9/16 10/15 11/15 12/15</p> <p><b>cause</b> [1] 14/6</p> <p><b>ceased</b> [1] 7/23</p>
<p>-</p> <p>--o0o [1] 14/2</p> <p>/</p> <p>/s/Bonita [1] 14/9</p> <p><b>1</b></p> <p><b>1000</b> [2] 2/15 2/20</p> <p><b>16-2116-SI</b> [1] 3/18</p> <p><b>17</b> [2] 1/6 3/2</p> <p><b>1:33</b> [1] 3/2</p> <p><b>1:49</b> [1] 13/8</p> <p><b>2</b></p> <p><b>20</b> [1] 6/20</p> <p><b>2000</b> [1] 2/5</p> <p><b>2018</b> [1] 7/20</p> <p><b>2020</b> [3] 1/6 3/2 11/15</p> <p><b>2022</b> [1] 14/9</p> <p><b>22</b> [1] 14/9</p> <p><b>230</b> [2] 2/8 2/11</p> <p><b>24-month</b> [1] 5/5</p> <p><b>2nd</b> [1] 2/11</p> <p><b>3</b></p> <p><b>301</b> [1] 2/20</p> <p><b>30th</b> [11] 9/18 9/23 10/6 10/17 11/6 11/15 11/18 11/21 11/24 11/24 12/24</p> <p><b>326-8188</b> [1] 2/21</p> <p><b>3:16-cv-02116-SI</b> [1] 1/4</p> <p><b>5</b></p> <p><b>503</b> [1] 2/21</p> <p><b>6</b></p> <p><b>600</b> [1] 2/15</p> <p><b>7</b></p> <p><b>703</b> [1] 2/5</p> <p><b>8</b></p> <p><b>8188</b> [1] 2/21</p>		

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